

SENATE: When Senator-elect has been seated by State
LEGISLATURE:
ELECTIONS: Senate, he is entitled to salary of such
COMPROLLER:
COMPENSATION: office.

January 11, 1951

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Mr. Elmer L. Pigg
State Comptroller and
Director of the Budget
Department of Revenue
State of Missouri
Jefferson City, Missouri

Dear Sir:

This is in answer to your letter of recent date requesting an official opinion of this department reading as follows:

"On December 12, 1950 I received a notice from Senator Milton F. Napier, advising me that he is contesting the election of Senator David A. Hess of the Second Senatorial District of Missouri.

"I would like to have your official opinion as to whether I should certify for payment the salary of Senator Hess or should it be held up pending the final decision, since the Senate has seated Senator Hess.

"I am enclosing the notice of contest which I have received from Senator Napier."

The notice of contest which you enclosed with your letter is one signed and sworn to by Milton F. Napier, as contestant, and was filed in the Senate of the 66th General Assembly of the State of Missouri.

Section 33.180, Revised Statutes of Missouri, 1949, provides as follows:

"Whenever any office, elective or appointive, the emoluments of which are required to be paid out of the state treasury, shall be contested or disputed by two or more persons claiming the right thereto, or by information in the nature of a quo warranto, then no claim shall be certified by the comptroller, nor any warrant signed by the auditor or paid by the treasurer, for the salary by law attached to said office, until the right to the same shall be legally determined between the persons or parties claiming such right; provided, however, that in all cases when the person to whom the commission for such office shall have been issued shall deliver to the party contesting his right to such office a good and sufficient bond in double the amount of the annual salary of such office, conditioned that if, upon final determination of the rights of the contestants, it shall be decided that the obligor is not, and the obligee therein is, entitled to the office in controversy, he shall pay over to the obligee the amount of salary therefor drawn by him as such officer, together with ten per cent interest thereon from the date of the receipt of each installment received by him, then, and in such case, notwithstanding the provisions of this law, a claim may be certified by the comptroller and a warrant may be signed by the auditor and paid by the treasurer, to the person holding the commission aforesaid, for the amount of his salary, as the same shall become due. It shall be the duty of any person contesting the election of any such officer to give notice of such contest to the comptroller and no such contest shall be heard or determined until he shall satisfy the tribunal trying

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such contest that such notice has been given."

Section 18, Article III of the Constitution of Missouri, provides in part as follows:

"Each house shall appoint its own officers; shall be sole judge of the qualifications, election and returns of its own members; * * * "

Section 5 of Article I of the Constitution of the United States provides in part as follows:

"Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, * * * "

The Supreme Court of the United States, in discussing that part of Section 5 of Article I of the Constitution of the United States, quoted supra, said in the case of Barry vs. U. S. ex rel. Cunningham, 49 S. Ct. 452, 73 L. Ed. 867, 279 U. S. 597, 1.c. 614:

"It is said, however, that the power conferred upon the Senate is to judge of the elections, returns and qualifications of its 'members,' and, since the Senate had refused to admit Vare to a seat in the Senate or permit him to take the oath of office, that he was not a member. It is enough to say of this, that upon the face of the returns he had been elected and had received a certificate from the Governor of the state to that effect. Upon these returns and with this certificate, he presented himself to the Senate, claiming all the rights of membership. Thereby, the jurisdiction of the Senate to determine the rightfulness of the claim was invoked and its power to adjudicate such right immediately attached by virtue of Sec. 5 of Article I of the Constitution. Whether, pending this adjudication, the credentials should

be accepted, the oath administered, and the full right accorded to participate in the business of the Senate, was a matter within the discretion of the Senate. This has been the practical construction of the power by both Houses of Congress; and we perceive no reason why we should reach a different conclusion."

It is to be noted that the provisions of the State and Federal Constitutions are substantially identical with regard to the power of each house of the General Assembly to determine the question of who shall be seated in each house. Therefore, we believe the ruling in the Cunningham case, quoted supra, to be applicable under the provisions of Section 18 of Article III of the Constitution of Missouri.

It follows, therefore, that when the contestee was seated by the Missouri Senate he thereby became a de jure member of such body and will continue to remain a de jure member of such body until and unless he is removed by the action of the Senate. It follows, therefore, that he is entitled as a de jure member of the Senate to the emoluments of such office.

It is clear that the provisions of Section 33.180, quoted supra, apply only to contests where the successful person in the contest is entitled to the emoluments of the office, and when it cannot be determined whether the contestant or contestee is entitled to the emoluments of the office until the contest has been decided. The fact that a provision is found in such section for the posting of bond conclusively demonstrates this fact.

Since the contestee in this case is a de jure member of the Senate and is entitled to the emoluments of such office until and unless he is removed by the Senate, Section 33.180 can have no application to such person. If it were held that Section 33.180 were applicable to a State Senator it would, of course, be unconstitutional to that extent since the provision of Section 18 of Article III of the Constitution, quoted supra, vests solely in the Senate the power to determine its own membership, and Section 33.180, if applicable to State Senators, would prohibit a de jure Senator from being paid the emoluments of his office and would thereby violate such constitutional provision.

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CONCLUSION

It is the opinion of this department that when a person has been sworn in as a member of the Senate, he is entitled to the emoluments of his office until he is unseated, even though a contest is pending on the question of whether or not he shall retain his seat.

Respectfully submitted,

C. B. BURNS, JR.
Assistant Attorney General

APPROVED:



J. E. TAYLOR
Attorney General of Missouri

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